U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON. D.C.

DATE: July 13, 1993
CASE NO. 84-CTA-89

IN THE MATTER OF

U.S. DEPARTMENT OF LABOR,

v.

THE EMPLOYMENT AND TRAINING CONSORTIUM.

BEFORE: THE SECRETARY OF LABOR

FINAL ORDER DISMISSING EXCEPTIONS

This case arises under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§ 801-999 (Supp. V 1981), [1] and its implementing regulations, 20 C.F.R. Parts 675-680 (1990). The Grant Officer (G.O.) filed exceptions to the Decision and Order (D. and 0.) of the Administrative Law Judge (ALJ) insofar as it held that $41,226.76 in costs disallowed by the G.O. would be allowed. The ALJ upheld the disallowance of $1,971.02 in misspent CETA funds. The case was accepted for review in accordance with 20 C.F.R. § 676.91(f).

The grantee, The Employment and Training Consortium, has requested that review be denied because the G.O.'s exceptions

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[1] CETA was repealed effective October 12, 1982. The replacement statute, the Job Training Partnership Act, 29 U.S.C. §§ 1501-1791 (1988), provides that pending proceedings under CETA are not affected. 29 U.S.C. § 1591(e).

were not timely filed. [2] Grantee's Brief at 1-2. Section 676.91(f) provides that the ALJ's decision shall constitute final action by the Secretary unless, within 30 days after receipt of the decision a party has filed exceptions with the Secretary. Because the regulations do not specify what constitutes filing with the Secretary, it is appropriate to look to the Federal Rules of Appellate Procedure for guidance. See United States Department of Labor v. Utah Rural Dev. Corn., Case No. 83-CTA-211, Sec. Ord., Oct. 15, 1986, slip op. at l-2.

Rule 25(a) permits filing by mail, but states that "filing [a notice of appeal] [3] shall not be timely unless ... [it is] received ... within the time fixed for filing, ..." See Voaelsans v. Patterson Dental Co., 904 F.2d 427, 430 (8th Cir. 1990) (Rules do not equate placing notice of appeal in mail with filing). Rule 26(a) states that, in computing a period of time, the last day shall be included unless it is a Saturday, a Sunday, or a legal holiday.

In the instant case, the G.O. received the ALJ's D. and 0. on April 24, 1987. Thirty days after that date was Sunday, May 24, 1987. The next day was Memorial Day, a federal holiday, so exceptions would have had to been filed on May 26, 1987. Although the G.O.'s exceptions were dated May 26, they were not

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[2] The G.O. has not responded to this contention.

[3] Exceptions filed with the Secretary are the functional equivalent of a notice of appeal in the federal court system.

received-by the Secretary until the afternoon of May 27, 1987, and therefore were not timely.

In the federal court system, the time limit for filing a notice of appeal is mandatory and jurisdictional. [4/] Although it is always within the discretion of an administrative agency to relax or modify procedural rules when in a given case the ends of justice require it, American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970), that principle does not apply where, as here, there is a jurisdictional problem. Id. at 537. In my view, strict adherence to the requirement that exceptions be timely filed is necessary to preserve the integrity of the Secretarial review process and to provide certainty regarding when the administrative action is final.

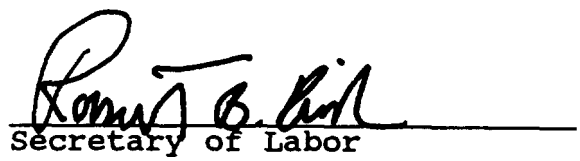
Accordingly, the G.O.'s exceptions are dismissed as untimely and the ALJ's D. and O. stands as the final action by the Secretary. [5/] In accordance with the D. and O., the grantee, The Employment and Training Consortium, is therefore ordered to pay $1,971.02 to the Department of Labor. This payment shall be from non-Federal Funds. Milwaukee County, Wisconsin v. Donovan, 771

[4/] Where there are unique or extraordinary circumstances, a party may be granted leave to file an untimely notice of appeal, see Marsh v. Richardson, 873 F.2d 129, 130 (6th Cir. 1989), if the court finds excusable neglect. The G.O. in this case did not request leave to file the exceptions late. Had the G.O. done so, excusable neglect probably would not be established as it does not include inadvertence or mistake of counsel, the likely reasons for the G.O.'s failure to timely file. See Alaska Limestone Corp. v. Hodel, 799 F.2d 1409, 1411 (9th Cir. 1986).

[5/] In view of this disposition, it is not necessary to address the issues raised by the grantee.

F.2d 983, 993 (7th Cir. 1985), cert. denied, 476 U.S. 1140 (1986).

SO ORDERED.



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In the Matter of

U. S. DEPARTMENT OF LABOR

v.

THE EMPLOYMENT AND TRAINING CONSORTIUM

CASE NO. 84-CTA-89

NOTICE OF TRANSMITTAL

The above-entitled matter having been heard before the undersigned Administrative Law Judge pursuant to § 676.90 of the Regulations, a copy of the Decision and Order is hereby served on all parties.

This decision becomes the final decision of the Secretary of Labor unless the Secretary modifies or vacates the decision within 30 days after it is served [20 C.F.R. § 676.91(f)].

Edward C Burch

EDWARD C. BURCH
Administrative Law Judge

Dated: APR 2 2 1987
San Francisco, California

ECB:csw

U.S. Department of Labor

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DATE: APR 2 2 1987
CASE NO. 84-CTA-89

IN THE MATTER OF

U. S. DEPARTMENT OF LABOR

V.

THE EMPLOYMENT AND TRAINING CONSORTIUM

William W. Kates, Esq.
For the U. S. Department of Labor

Peter L. Maier, Esq.
For The Employment & Training Consortium

Before: EDWARD C. BURCH
Administrative Law Judge

DECISION AND ORDER

This matter arises under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§801 et seq. Following an audit, a Grant Officer of the U.S. Department of Labor determined that certain CETA funds received by the Employment and Training Consortium (ETC) had been misspent. At the time of hearing, four separate cost items were still in dispute, totalling $43,197.78.

1. Back pay in Nancy Light/Scott Winslow Arbitration:

This issue arose from the followinq situation. In 1981, budget cuts reduced ETC's CETA funds from $80,000 to $40,000 (Transcript - T - p. 20). This forced ETC to lay off some of its employees (T p. 20). Amonq those layed off were Nancy Light and Scott Winslow (T p. 21). All of ETC's employees were covered under a union contract with Local 1652-M of the American Federation of City and County Municipal Employees (AFCCME). Under the union contract, which was only in effect for 3 months when the lay off occurred, a layed off employee could " bump" a less senior employee in the same job family (T p. 25; C-l). Both Nancy Light and Scott Winslow wanted to exercise this "bumping" right; however, ETC, under section 14.4 of the union contract, refused to allow them to bump the

only Asian female left on staff (T p. 28). Section 14.4 provides:

> An employee(s) possessing skills or qualifications which are necessary for the remaining position(s) and which the more senior employee(s) in the same classification does not possess, may be ret-ained or recalled by the Employer regardless of seniority in lieu of retaining or recalling the more senior employee(s).

After ETC used this provision to prevent Light and Winslow from bumping its only remaining Asian employee, both layed off employees sought administrative hearings (T pp. 29-30). After ETC's Executive Director upheld its decision at a first hearing, the employees exercised their right under the union contract to submit the matter to binding arbitration before an arbitrator appointed by the Public Employees Relation Commission of the State of Washington (T p. 31). The arbitrator found in favor of Light, specifically finding that ETC's affirmative action plan contained no provisions regarding its application to seniority and layoff rights, and that the term "qualification" in section 14.4 did not include the "circumstance of inheritance" (C-2, pp. 8 & 9).

As required by this decision, ETC reinstated Light and paid her back wages (T p.33). Since Winslow's case was identical to Light's, ETC also rehired him and paid him his back wages, deciding not to waste any legal funds in pursuing his case through arbitration (Light's case happened to be calendared first) (T 34).

The back wages paid to Light and Winslow (totalling $34,701.33) were paid out of CETA funds, and designated by ETC as administrative costs (T pp. 37-38). The Grant Officer argues that these funds are not allowable as administrative costs, and were therefore misspent.

20 C.F.R. §676.41-1(f) defines administrative costs as follows:

> (f) Administrative costs shall consist of all direct and indirect costs associated with the management of the program. . .Administrative costs shall be limited to those necessary to effectively operate the program.

41 C.F.R. 529.70-103 generally describes allowable costs as follows:

> In determining allowable costs under a grant or agreement, the DOL agency shall use Federal cost principles referenced in this section which are applicable to the recipient's organization; ...and shall allow only those costs permitted under the cost principles which are reasonable, allocable, necessary to achieve the approved proqram goals, and which are in accordance with DOL Agency policy and terms of the grant or agreement. ..

Neither 41 C.F.R. Subpart 15.711, which lists a number of allowable costs applicable to CETA grants, nor 41 C.F.R. Subpart 15.713, which lists some unallowahle costs under CETA, contain any reference to costs associated with labor disputes. However, 41 C.F.R. §15.710 states, in part:

> Failure to mention a particular item of cost in the standards *is* not intended to imply that it is either allowable or unallowable; rather, determination of should be based on the treatment of standards provided for similar or related items of cost.

The arbitrator found that ETC had breached the terms of the union contract with respect to Nancy Light. The Grant Officer has characterized this breach of contract as a "violation of the private law and regulations embodied in [ETC's] collective bargaining agreement." Since costs resulting from failure to comply with Federal, State and local law and regulations are specifically disallowed under 41 C.F.R. 615.713-5, he argues, the back pay awards should be considered the cost of a violation of private law and similarly disallowed.

I do not find this argument persuasive. Although it is true that the arbitrator found ETC to be in breach of the union contract, the dispute arose over a legitimate difference of opinion in the interpretation of the layoff provisions of the contract. This kind of dispute is very different in character from a failure to comply with existing law or regulations.

The question to be resolved is whether or not a grantee's cost of defending its interpretation of a union contract in a labor dispute constitutes a reasonable and necessary cost of administering its CETA program. As an employer of union employees under its CETA program, it is reasonable to assume that ETC would from time to time be a party to a labor dispute under the union contract. Thus, I find that the cost of resolving labor disputes is "necessary to effectively operate

the [CETA] program" within the meaning of 20 C.F.R. 676.41-1(f). Further, I specifically find that ETC's position with respect to the layoff provisions of the contract in dispute here was a reasonable position to take, even though the arbitrator ultimately disagreed with ETC's interpretation of those provisions. I also find that, in view of the arbitrator's decision with respect to Nancy Light, it was reasonable for ETC to pay Winslow's back pay without resorting to litigation. Further, in refusing to allow Light and Winslow to bump the only professional Asian female left in its employ, ETC was attempting to uphold its affirmative action plan, which it believed it was required to do in order to comply with CETA regulations regarding affirmative action (T, p. 32; see 20 C.F.R. $676.52). The back pay awards thus resulted from ETC's good faith attempt to achieve CETA's affirmative action goals. Hence, I find that those awards were "necessary to achieve approved program goals" within the meaning of 41 C.F.R. §29.70-103.

Thus, I find that the back pay awards to Light and Winslow, totalling $34,701.33, are allowable as administrative costs.

2. Charles Benjamin Settlement:

The parties stipulated to the facts regarding this issue (T p. 48; see Hearing Brief of ETC, pp. 10-11). Charles Benjamin was an ETC employee who brought a series of nuisance suits against ETC. The last of these, alleging race discrimination, was heard by an arbitrator, who found no evidence of intentional discrimination, but nevertheless awarded Benjamin $1500 in damages and $750 in attorney fees on the grounds that ETC had not followed its personnel manual. ETC elected to settle with Benjamin for $1000, rather than appealing the arbitrator's award. The settlement included a complete release from Benjamin for the discrimination claim and all future claims (T p. 50).

Although Benjamin's claim did not arise from a union contract dispute, like the Light/Winslow litigation this matter is a type of labor dispute, here a claim that ETC had engaged in racial discrimination. Had this claim been meritorious, its defense could not be allowed as an administrative cost which was "necessary to effectively operate the [CETA] program" under 20 C.F.R. 676.41-1(f), since racial discrimination runs counter to the goals of the CETA program. However, the parties have stipulated that Benjamin had instituted nuisance suits, rather than any meritorious

claims. [1] [2] ETC was obliged to defend itself from these claims, whether or not they had merit. I find that ETC's action in obtaining Benjamin's release of the racial discrimination claim as well as all future claims was a reasonable attempt to prevent the waste of CETA funds in the defense of future frivolous claims. In that sense, I find that the settlement of his claim was necessary to effectively operate ETC's CETA program. Thus, I find that this settlement is an allowable administrative cost.

3. Attornev fees paid to ETC's Counsel in the Light and Beniamin Cases.

ETC paid a total of $5,525.43 in attorney fees for the resolution of the Light and Benjamin matters. The grant officer argues that these fees are not allowable.

Under 41 C.F.R. §1-15.711-16, "the cost of legal expenses required in the administration of grant programs is allowable." [3] Since I have found that the Light/Winslow back pay awards and the Boniamin settlement were allowable administrative costs, it necessarily follows that the legal fees incurred in the litigation of those matters are also allowable.

4. New Careers:

New Careers was a subgrantee of ETC. Initially, it also received funding from other sources: however, later ETC was its only source of funding (T pp. 42-43). The organization folded in 1982 (T p. 43). After the organization folded, ETC discovered that it had spent $3000 to do a feasibilitv study for soliciting private money (T p. 44). The parties agree that this money was misspent by New Careers (T p. 46: see Hearing Brief of ETC, p. 8).

ETC garnished New Career's two bank accounts (containing $394 and S634 respectively) in an attempt to recover the money

[1] Although the arbitrator found that ETC had failed to follow its personnel manual, this finding has no effect in light of the fact that the suit was ultimately settled.

[2] Marvin Grevstad, ETC's accountant, testified that Benjamin's litigation and grievances had taken thousands of hours in staff time and hundreds of hours in attorney time.

[3] Some legal expenses are specifically prohibited by §1-15.711-16; however the legal expenses at issue here do not fall into those categories.

(ETC Hearing Brief p. 9). Since the organization was defunct and had no other assets, ETC did not pursue further collection efforts (ETC Hearing Brief, p. 9).

ETC argues that since it pursued every avenue possible to recover the misspent funds, it should not be held liable for the balance remaining after its collection efforts (totalling $1,971.02). As authoritv for this proposition, ETC cites Quechan Indian Tribe v. U.S.D.O.L., 723 F.2d 733 (9th Cir. 1984), and Department of Labor v. City of Portland, (ALJ) 87-CTA-107. However, these cases are distinguishable from the case at bar. In Quechan, although the prime sponsor had failed to comply with the reporting requirements under CETA, it had actually spent the funds on programs for which they were intended. The court remanded the case to the Secretary to consider whether the Department of Labor should waive its right to recoupment. In City of Portland, funds had been misspent due to fraud on the part of a participant, not due to any negligence or wrongdoing on the part of either the prime sponsor or its subrecipient. In contrast to these two cases, the funds at issue here were clearly misspent due to the wrongdoing of the subrecipient, New Careers.

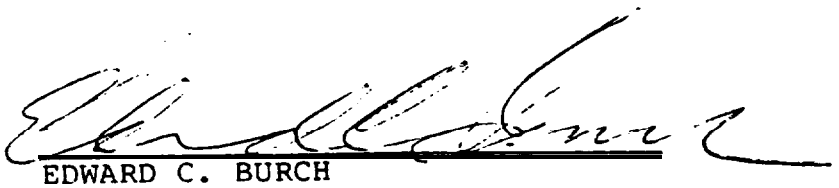
A prime sponsor is in a better position to monitor the actions of its subgrantees than is the Department of Labor. Even though the ETC itself did not misspend the funds at issue here, it also did not take steps to insure that New Careers was complying with CETA. As Marvin Grevstad, ETC's accountant, testified, New Careers' records were in "tremendous disarray," and ETC had to hire a CPA firm to recreate them. Further, as the Grant Officer has pointed out, numerous cases have held the prime sponsor responsible when its subgrantees have misspent funds. See, for example, Corn. of KY, Dept. of Human Resources v. Donovan, 704 F.2d 288 (6th Cir. 1985, Milwaukee County v. Peters, 682 F.2d 609 (7th Cir. 1982), and other cases cited by the Grant Officer in his Memorandum of Points and Authorities, p. 4.

Accordingly, I find that ETC is liable for repayment of the balance of the CETA funds which were misspent by New Careers, totalling $1,971.02.

ORDER

1. ETC is ordered to pay the Department of Labor $1,971.02 in disallowed costs with respect to New Careers.

2. The Department of Labor is ordered to refund ETC for any part of the funds herein allowed which ETC has paid to the Department of Labor.



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CERTIFICATE OF SERVICE

Case Name: In the Matter of U.S. Department of Labor v. The Employment and Trainina Consortium

Case No. : 84-CTA-89

Document : Final Order Dismissing Exceptions

A copy of the above-referenced document was sent to the following persons on JUL 13 1993.

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